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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 518.

MARGARET E. ALLRED ET AL.,
Appellants,

vs.

H. L. HEATON ET AL.,
Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE 10TH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellants, pursuant to Rule 16(3) of the Revised Rules of the Supreme Court, answer Appellees' Motion to Dismiss or Affirm and would show that this Court clearly has jurisdiction of this cause and that review is appropriate by appeal.

STATEMENT.

In the Jurisdictional Statement filed herein appellants stated that the Court of Civil Appeals had attempted to inject, or to cloud, the issue with an alleged non-federal ground, and some discussion was made by appellants at pages 7-10 thereof.

Both the trial court and the Court of Civil Appeals passed upon the Federal Questions presented by holding that the Resolution of the College excluding women is valid. The so-called non-federal ground referred to is taken from the following language of the Court of Civil Appeals:

> "So, here we have an attack made upon the college without the applicants having been refused admission to the college. Can this Court assume that the applicants desire to enter A. & M. College when they do not make application, and when their attorney elects to advise them not to do so? We think the answer is 'No'. Surely no justiciable controversy is here presented". (Jur. St. p. A18).

The female appellants, being met at the threshold with the Resolution excluding all women as students, sought relief as prospective students, since the total ban against women students made their entry impossible regardless of their qualifications otherwise. The relief they seek is declaration of the invalidity of the exclusionary Resolution with right of entry as students upon proof of qualifications when proof thereof is meaningful.

INDEPENDENT NON-FEDERAL GROUNDS DO NOT EXIST.

After filing the Jurisdictional Statement, appellants discovered another ground which makes the lack of any independent non-federal ground conclusive. If there is any non-federal ground it must be based upon the statement in the opinion of the Court below that no justiciable controversy was presented. However, regardless of the somewhat vague statement about justiciable controversy as referred to, the Texas Courts did treat this matter as a justiciable controversy by rendering an affirmative judgment on the merits of the case, expressly affirmed by the Court of Civil Appeals, and impliedly affirmed by the Supreme Court of Texas. If no controversy had existed, the state courts would have been required to dismiss this action or reverse the judgment of the trial court with instructions to dismiss, as being without justiciable controversy and thus outside the jurisdiction of the courts. But the trial court rendered a judgment expressly declaring the Resolution of the College to be valid, permitted a class action and took jurisdiction of the whole case (Trial Trans. 26). This judgment was wholly affirmed without qualification by the judgment of the Court of Civil Appeals, from whose judgment this appeal lies (Jur. St. p. A24).

When no justiciable controversy exists or a moot question is presented, the Texas rule precludes the rendition of judgment, and the case must be dismissed. *City of West University Place* v. *Martin*, 132 Tex. 354, 123 S.W.2d 638; *McNeill* v. *Hubert*, 119 Tex. 18, 23 S.W.2d 331; 3 Tex. Jur. 2d, §50, p. 313; 4 Tex. Jur. 2d, §702, p. 205. This is the general rule, apparently without exception. Cf. *International L. & W. Union* v. *Boyd*, 347 U.S. 222, 224.

While the rationale of a judgment is usually gathered from a Court's opinion, it is the judgment which is under review and not the opinion, as this Court has recognized. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. The State Court cannot say that no controversy is presented, and yet render a judgment affirmatively disposing of all issues as a final judgment. The power of this Court is to correct wrong judgments, not to revise opinions. The statement in the opinion as to the non-federal question is necessarily dictum.

Upon Application for Writ of Error to the Supreme Court of Texas that Court refused the application of appellants with notation, "writ of error refused, no reversible error", which means that the Texas Supreme Court was not satisfied that the opinion of the Court of Civil Appeals in all respects correctly declared the law, but that the appellants' application presented no error requiring reversal. The judgment was approved but not the opinion. See Rule 483, Texas Rules of Civil Procedure. If no justiciable controversy had been presented by this case, the Texas Supreme Court would necessarily have been required to make the notation, "dismissed for want of jurisdiction". Rule 483. This matter was expressly pointed out to the Texas Supreme Court in the Application for Writ of Error. The Texas Supreme Court, therefore, also regarded this as a justiciable controversy.

THERE IS NO ADEQUATE NON-FEDERAL GROUND TO SUPPORT THE JUDGMENT.

By clear stipulation with the appellees, the women are excluded from the college as students by reason of the attacked Resolution. At pages 12-13 of the Record the following appears:

> "Pursuant to Articles 2610 and 2613(6) of the Texas Statutes, and pursuant to Texas Law generally, conferring government and control of the College upon the Board of Directors, women are excluded as students by the Board except for summer school instruction, under a Resolution or Regulations dated September 3, 1925, amended February 23, 1926, recorded in Volume 6, pp. 46 and 66, Official Minutes of the Board of Directors of the College, *which regulations or resolutions have never been repealed, impaired or rescinded, and they are still effective and enforced actions of the Board to date and at all times material to this suit*, copies of said attacked Resolution or Regulations being attached hereto and made a part hereof." (Emphasis added).

Furthermore, well before the school term began, Miss Allred, after inquiry concerning her admission to the College, received this answer from the administrative officer of the College in charge:

> "Dear Miss Allred:
> "Your recent request has been interpreted as an indication that you may wish to enroll at the A. and M. College of Texas. We appreciate your interest but wish to advise that our school is not a coeducational institution. In view of this situation, we are not sending the information as requested in your recent communication." (R. 45).

It will be seen that the College cut Miss Allred off without a chance to prove any qualifications, and all of

the evidence shows, without conflict, that any appeal or request to any of the administrative officials of the college would have been in vain. When application blanks were sent by the Registrar to the undersigned attorney, it was expressly noted that it was without condition or waiver of the College's position, and the requests for forms was made by the attorney conditionally, "if the College will accept the women upon proof of qualifications considering the above, please send the necessary applications * * *." (R. 46).

The Court of Civil Appeals, in connection with its statement as to judicial controversy said: "Can this Court assume that the applicants desire to enter A. & M. College when they do not make application, and when their attorney elects to advise them not to do so?" The answer is that the court could have found the solution to that question in a solemn stipulation in the record, at page 6:

> "Margaret Elizabeth Allred desires to enroll as a student at the Agricultural and Mechanical College of Texas subject to her qualifications for entry other than sex. She desires to study as an under-graduate for a degree in floriculture."

The College defended this suit on the theory, and the sole theory, that the exclusionary Resolution was valid as against constitutional objections, and that all women were excluded by the Resolution regardless of circumstances. Any claim of lack of notice is wholly arbitrary.

It will be remembered that the Court of Civil Appeals unqualifiedly affirmed the judgment of the trial court, and the trial court made findings of fact in favor of the female appellants; it found that a justiciable controversy did exist; that the college had refused the women entry or consideration therefor and that the women desired to

matriculate in good faith (Trial Trans. 23-25). Most of these findings are purely questions of fact, and within the exclusive jurisdiction of the trial court, the Court of Civil Appeals having no authority to make original findings of fact or to disturb the findings of the trial court. *Briarcroft Dev. Co.* v. *Stone*, 281 S.W.2d 347, 351 (Tex. Civ. App., Waco, 1955), no writ history; *Harris County* v. *Hall*, 141 Tex. 388, 172 S.W.2d 691, 695; 4 Tex. Jur. 2d, §839, pp. 398-402. For an analysis of this identical subject, see *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 143. Under established Texas law, the only control of facts by a Court of Civil Appeals lies in its ability to reverse and *remand* a case on the insufficiency of evidence or the overwhelming weight of credible testimony. *Childre* v. *Casstevens*, 148 Tex. 297, 224 S.W.2d 461, 462, Note 3; 38 Tex. L. Rev. 361. In the case at bar the judgment was affirmed, and the appellate court was bound by the trial court's findings on fact issues. Under the judgment here for review, even the class action was not disturbed.

Moreover, under established Texas law involving matters pertaining to the administration of school laws and involving pure questions of law as contradistinguished from questions of fact, immediate resort to the courts is proper. A complete analysis of Texas cases is made in *Bruce* v. *Stilwell*, 206 F.2d 554 (5th Cir. 1953). No administrative official of this institution had any authority to pass upon a constitutional question. Cf. *Henderson* v. *Miller*, 286 S.W. 501, 508 (Tex. Civ. App.), writ. ref. The only ground of attack made in this case involves the Equal Protection Clause of the Federal Constitution. Any plea to an administrative official of a college by a citizen of Texas, graduated from an accredited high school in Texas, desiring an education at a state college or univer-

sity would have been unnecessary under settled Texas law, as well as futile, when a constitutional question is presented. To say that the only remedy lies with the body that perpetuates the abuse claimed is to admit that there is no remedy. This situation is well summed up in the words of Justice Field in the case of *Cummings* v. *Missouri*, 4 Wall. 277, 327:

> "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition * * *."

Appellees cannot be heard to say that these women are not entitled to have these constitutional questions heard because they refused to do the physically impossible. There was no possible way they could have received a real hearing through any administrative official with the Resolution in effect. The bar is at the threshold of this question. Since admission is barred, certainly application for admission is a meaningless gesture.

CONCLUSION.

That the question is substantial has been fully discussed before. When a state decides to offer education to men which is denied to women, or to make it more difficult for women to receive a good college education, the substantiality of the questions are obvious to our minds.

The prior case of *Bristol* v. *Heaton*, 317 S.W.2d 86 (1958), No. 581 Misc., Appeal Dism., cert. denied 359 U.S. 230, did not properly involve a direct attack upon the involved Resolution, and did not involve a course of study offered to men and refused to women, or offered nowhere else in Texas. Surely, the action of this Court

in the prior case is immaterial in this case under well-established rules of this Court. No decision on these questions has ever been made by this Court.

On page 12 of appellees' Motion to Dismiss or Affirm, a copy of the Act establishing the Texas Commission on Higher Education is attached. That agency has nothing whatsoever to do with the admission of women, no order by it is involved, and it has never taken any action upon this subject except to plead with the Board of Directors of the College to admit women. The case of *Bristol* v. *Heaton*, *supra*, held that this matter, so far as state law is concerned, rests with the Board of Directors of the College.

Wherefore, appellants pray as in their Jurisdictional Statement filed herein.

Respectfully submitted,

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